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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANNY REUBEN KERBS, Defendant and Appellant.	A110459 (Sonoma County Super. Ct. No. 25640)

INTRODUCTION

Appellant Danny Reuben Kerbs appeals from the extension of his civil commitment pursuant to Penal Code section 1026.5, subdivision (b).[1] Appellant argues that the jury instruction used in his civil commitment trial lacked an additional element now required pursuant to the California Supreme Court's decision in *In re Howard N.* (2005) 35 Cal.4th 117, 132 (*Howard N.*); specifically, that the person subject to commitment have "serious difficulty in controlling dangerous behavior." Appellant argues that the failure to instruct on this element and the lack of evidence to support the element constitutes reversible error. We disagree, and affirm the trial court's ruling.

BACKGROUND

Appellant was originally found not guilty by reason of insanity of one count of committing assault with a deadly weapon. Appellant was committed to the state hospital in Napa for a maximum term of four years, which was extended for two additional years

[1] All further statutory references are to the Penal Code unless otherwise indicated.

on July 10, 2001, and again on July 10, 2003, under the commitment scheme of section 1026.5, subdivision (b). On February 10, 2005, the People again petitioned to extend appellant's commitment upon request of the medical director of the state hospital, under section 1026.5, subdivision (b).

At the jury trial for extension of commitment, evidence was offered concerning appellant's mental health. Dr. Julius Fu, a psychiatrist at Napa State Hospital, testified that he had reviewed appellant's medical records and interviewed him. Based on that information, Dr. Fu determined that appellant suffered from paranoid schizophrenia and that based on his symptoms, appellant remained a substantial risk of harm to others and there was a high risk that appellant would reoffend. Some of the symptoms that appellant had were delusions: that he worked with the Secret Service, was a psychologist, and that people were eating babies. Dr. Fu had interviewed appellant in April of 2005, and at that time, appellant had told him that appellant's prior social worker ate babies as part of a ritual and was "beaten up by 50 faggots." As a result of these delusions, Dr. Fu believed that if appellant was released, he may commit another assault against a person he believes to be "either a baby killer or eating babies or doing ritualized witchcraft or is against him or any one of a number of his fears that he has and then reoffend."

Christina Barasch, a clinical social worker and director of CONREP (Conditional Release Program), also testified as to appellant's mental health. According to Barasch, appellant needed prompting to take his medications, did not understand his mental illness, minimally participated in his treatment plan and had difficulty with grooming and hygiene. Barasch also feared that appellant would reoffend because of the verbal aggression that appellant exhibited on the unit. She explained that often verbal aggression escalated and led to physical assault and that it was in her opinion that appellant represented a substantial risk of harm to others.

In addition to the testimony of Dr. Fu and Barasch, the jury also heard the testimony of appellant. In that testimony, appellant stated that he did not have a mental illness but just got "stressed out" and had tranquilizers to keep calm. Although appellant was generally able to answer questions while testifying, he also managed to accuse the

prosecuting attorney of getting into fights, using drugs, and being a satanic worshipper and an "occult ritualist" in responding to her questions.[2] Appellant also stated that he knew for a fact that people at Napa State Hospital were practicing voodoo.

On May 26, 2005, a jury found that appellant had a mental disease, defect or disorder and by reason of that mental condition, represented a substantial danger of physical harm to others. Appellant was recommitted to Napa State Hospital for an additional two-year term set to expire on July 10, 2007. Appellant filed this timely appeal.

DISCUSSION

I. Relevant Statutory Provisions

Under section 1026.5, subdivision (b)(1), "[a] person may be committed beyond the term prescribed by subdivision (a) only under the procedure set forth in this subdivision and only if the person has been committed under Section 1026 for a felony and by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others." The maximum term of commitment prescribed in subdivision (a) is "the longest term of imprisonment which could have been imposed for the offense or offenses of which the person was convicted . . . ." (§ 1026.5, subd. (a)(1).)

At no less than 90 days before the term of commitment ends, the prosecuting attorney may file a petition for extended commitment in the superior court which issued the original commitment. (§ 1026.5, subd. (b)(2).) The person named in the petition has a right to be represented by an attorney and the right to a jury trial. (§ 1026.5, subd. (b)(3).) If, after trial, the court or jury finds the patient "by reason of a mental disease, defect, or disorder represents a substantial danger of physical harm to others," the patient

[2] Appellant also made several outbursts throughout the proceedings, responding to questions directed at Dr. Fu or Barasch. His own counsel noted on the record that his client "is displaying more and more bizarre behaviors in the courtroom and is acting out in front of the jury, and it's starting to escalate. He seems to be decompensating in the courtroom."

will be recommitted for an additional period of two years from the date of termination of the previous commitment. (§ 1026.5, subd. (b)(8).)

II. Relevant Case Law

The United States Supreme Court has repeatedly "recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." (*Addington v. Texas* (1979) 441 U.S. 418, 425.) Section 1026.5, subdivision (b), and other similarly worded commitment statutes have been recently challenged in several cases before the United States Supreme Court and the California Supreme Court. The decisions in those cases establish the conditions in which a person may be civilly committed.

In *Kansas v. Hendricks* (1997) 521 U.S. 346, 371 (*Hendricks*), the court found that the commitment provisions of the Kansas Sexually Violent Predator Act (Kan. Stat. Ann. § 59-29a01 et seq.; SVPA) satisfied due process requirements. The commitment provision required that a person had been convicted of or charged with a sexually violent offense, suffered from a mental abnormality or personality disorder that made them likely to engage in predatory acts of sexual violence, and a finding of dangerousness either to one's self or to others. (*Hendricks*, at p. 357.) The court noted that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as 'mental illness' or 'mental abnormality.' " (*Id.* at p. 358.) These additional statutory requirements "limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." (*Ibid.*)

Following *Hendricks*, the California Supreme Court analyzed the commitment provision of the California SVPA, Welfare and Institutions Code section 6600 et seq., in *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138 (*Hubbart*). For commitment under the California SVPA, a "sexually violent predator" must suffer from "a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (Welf. & Inst.

Code, § 6600, subd. (a)(1).) Like the Kansas SVPA, the California SVPA required a finding of dangerousness linked to a finding of "a currently diagnosed mental disorder characterized by the inability to control dangerous sexual behavior." (*Hubbart*, *supra*, 19 Cal.4th at p. 1158.) The court found that "due process *requires* an inability to control dangerous conduct, and does not restrict the manner in which the underlying impairment is statutorily defined." (*Ibid*.) Because the commitment provision in the California SVPA was so similar to the provision upheld in the Kansas SVPA, the court also upheld the California SVPA commitment statute. (*Hubbart*, at p. 1157.)

The Kansas SVPA again came before the United States Supreme Court in *Kansas v. Crane* (2002) 534 U.S. 407 (*Crane*). The Kansas Supreme Court had interpreted *Hendricks* as requiring a dangerous individual to be completely unable to control his or her behavior before being civilly committed. (*Crane,* at p. 411.) The court disagreed, holding that "*Hendricks* set forth no requirement of *total* or *complete* lack of control. *Hendricks* referred to the Kansas Act as requiring a 'mental abnormality' or 'personality disorder' that makes it '*difficult*, if not impossible, for the [dangerous] person to control his dangerous behavior.' " (*Ibid.*) Furthermore, the court recognized "that in cases where lack of control is at issue, 'inability to control behavior' will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior." (*Id.* at p. 413.)

After *Crane*, the California Supreme Court had another opportunity to review the California SVPA in *People v. Williams* (2003) 31 Cal.4th 757. In that case, the defendant had been committed under the SVPA. (*Id.* at p. 759.) The jury received instructions that did not include an instruction to find that the defendant had serious difficulty controlling his behavior. (*Ibid.*) However, the court found the language of the instruction "inherently encompasses and conveys to a fact finder the requirement of a mental disorder that causes serious difficulty in controlling one's criminal sexual behavior." (*Ibid.*) Even if an instructional error had occurred, the court found the evidence presented at trial so overwhelming that "no rational jury could have failed to find he harbored a mental disorder that made it seriously difficult for him to control his violent sexual

impulses." (*Id.* at p. 760.) The lack of a "control" instruction was deemed harmless beyond a reasonable doubt. (*Ibid.*)

Two years later, the California Supreme Court considered whether the extended detention scheme under Welfare and Institutions Code section 1800 et seq. violated due process because it did not expressly require a finding that the person's mental impairment caused serious difficulty in controlling behavior. (*Howard N., supra*, 35 Cal.4th at p. 122.) The commitment statute at issue in *Howard N.* authorized extended detention of dangerous persons who are under the control of the Department of Youth Authority, and was very similar to section 1026.5, subdivision (b)(1) as they both contained a requirement of physical dangerousness to the public and mental deficiency, disorder or abnormality.[3] The court concluded that the extended detention scheme under section 1800 "should be interpreted to contain a requirement of serious difficulty in controlling dangerous behavior." (*Howard N.*, at p. 132.) The court further explained, "we can preserve the constitutionality of the extended detention scheme by simply interpreting the scheme to require not only that a person is 'physically dangerous to the public because of his or her mental . . . deficiency, disorder, or abnormality,' but also that the mental deficiency, disorder, or abnormality causes him to have serious difficulty controlling his dangerous behavior. This aspect of the person's condition must be alleged in the petition for extended commitment (§ 1800), and demonstrated at the probable cause hearing (§ 1801) and any ensuing trial (§ 1801.5)." (*Id*. at p. 135.)

Soon after *Howard N.* was decided, the Court of Appeal addressed the same commitment statute in *In re Michael H.* (2005) 128 Cal.App.4th 1074. In that case, the juvenile court had ordered the defendant's commitment extended for two years after a

[3] California's Welfare and Institutions Code section 1800 was amended on July 21, 2005, to include the additional element. It now reads, in pertinent part, "Whenever the Department of the Youth Authority determines that the discharge of a person . . . would be physically dangerous to the public because of the person's mental or physical deficiency, disorder, or abnormality which causes the person to have serious difficulty controlling his or her dangerous behavior . . . ."

court trial. (*Id.* at p. 1079.) However, the petition seeking to extend the defendant's commitment did not contain allegations that the potential committee's mental deficiency, disorder, or abnormality caused him serious difficulty in controlling his behavior. (*Id.* at p. 1080.) As a result, the court found the petition insufficient under the requirements established in *Howard N.*, and the order of commitment was reversed and the case was remanded to the juvenile court. (*Id.* at p. 1091.)

Most recently, in *People v. Green* (2006) 135 Cal.App.4th 1315, 1318 (*Green*), the Court of Appeal reviewed section 1026.5, subdivision (b)(1) in a case factually similar to the present action. In *Green*, defendant had been found not guilty of arson by reason of insanity and was committed to a state hospital pursuant to section 1026.5. Defendant was released under CONREP twice, but was eventually recommitted both times for incidents of violence, drug use and sexual assault. (*Id.* at p. 1318) More than two months before defendant's maximum date of commitment, May 1, 2004, the People filed a petition pursuant to section 1026.5 to extend his commitment for an additional two years. (*Green*, at p. 1318.) At the hearing on the petition, two psychiatrists and two psychologists testified for the State, offering their undisputed opinion that defendant suffered from a severe mental disorder that made him an unacceptable risk of violence against others. (*Id.* at p. 1334.) Defendant's witnesses, which included a librarian, a rehabilitation therapist and two psychiatric technicians, only opined that defendant was "a good worker who showed empathy," had coping skills and was polite to staff. (*Ibid.*) The court instructed the jury, pursuant to CALJIC No. 4.17, that the issue for determination was whether the defendant, by reason of a mental disease, defect or disorder, represented a substantial danger of physical harm to others. (*Green,* at p. 1333.) The jury found that defendant had a mental disorder, and as a result of such disorder, represented a substantial danger of physical harm to others; defendant was recommitted to the state hospital for two more years. (*Id.* at p. 1321.)

As in the present case, the defendant argued on appeal that extending his commitment based on section 1026.5 was error because it does not require proof that he was unable to control his behavior, and that the trial court erred in using CALJIC No. 17

because it fails to include the volitional requirement. (*Green, supra,* 135 Cal.App.4th at p. 1318.) After extensive review of the relevant case law and similar commitment statutes in California, the Court of Appeal concluded that "a recommitment under section 1026.5 is proper when (1) the person potentially recommitted has a mental disease, defect or disorder and (2) that condition causes the person to have serious difficulty controlling his or her behavior or seriously affects the potential committee's capacity to properly perceive and process reality or the condition affects both capacities such that (3) the individual is a substantial danger of physical harm to others." (*Green*, at p. 1332.) Because neither the recommitment petition nor the jury instructions included the required findings of cognitive or volitional incapacity, the court found them inadequate. (*Id.* at p. 1333.) Despite the inadequacies of the recommitment petition and jury instructions, the court upheld recommitment of the defendant, finding the instructional error harmless given the evidence presented to the jury. (*Id.* at p. 1334.)

III. Analysis

We agree with the conclusions of the opinion in *Green*, *supra*, 135 Cal.App.4th 1315. While there does not need to be a total or complete lack of control, the cases have established that for civil commitment to be constitutional, there needs to be a showing of an inability to control behavior. (*Crane*, *supra,* 534 U.S. at p. 411.) Such a requirement limits involuntary civil commitment to individuals who are dangerous as a result of their volitional impairment. (*Hendricks, supra,* 521 U.S. at p. 358.) This requirement is now consistent across all three civil commitment statutes in California, including the SVPA, Welfare and Institutions Code section 1800, and section 1026.5. The *Green* court's requirements for civil commitment under section 1026.5 appropriately includes all the elements necessary to satisfy the requirements of substantive due process.

In the present case, appellant's commitment was extended after a jury found, beyond a reasonable doubt, that appellant, by reason of a mental disease, defect or disorder, represented a substantial danger of physical harm to others. Under the current interpretation of section 1026.5, the jury needed to additionally find that appellant's mental disease, defect or disorder caused him to have serious difficulty controlling his

behavior, or seriously affected his capacity to properly perceive and process reality, or both. Appellant argues that, since the instruction did not require the jury to make such a finding in this case, it was therefore inadequate.[4]

"[A]n instructional error that improperly describes or omits an element of an offense . . . generally is not a structural defect in the trial mechanism that defies harmless error review and automatically requires reversal under the federal Constitution." (*People v. Flood* (1998) 18 Cal.4th 470, 502-503.) If "the absence of a 'control' instruction was harmless beyond a reasonable doubt," the instruction error was not prejudicial. (*People v. Williams*, *supra*, 31 Cal.4th at p. 760.) In coming to its determination, the jury considered the evidence offered by the People, including the testimony of Dr. Fu, Barasch and the appellant himself.

Dr. Fu testified that appellant suffered from paranoid schizophrenia and suffered a variety of delusions regarding those around him. These delusions included beliefs that people were eating babies (including his prior social worker) and practicing ritualized witchcraft. As a result of these delusions, Dr. Fu believed there was a high risk appellant would commit another assault if released. Barasch testified that she feared appellant would reoffend because of the verbal aggression that appellant exhibited on the unit. She also testified that appellant needed prompting to take his medication, did not understand his illness, and only minimally participated in his treatment plan. The jury also considered the testimony and courtroom behavior of the appellant. During cross examination, appellant testified that he believed the prosecuting attorney got into fights, used drugs, worshipped Satan, was an "occult ritualist," and that people at Napa State Hospital practiced voodoo. In addition to his testimony, the jury also witnessed appellant's several outbursts throughout the proceedings.

[4] There was no objection to the jury instructions when they were proposed or given, and respondent argues waiver to dispose of this appeal. Although the argument is tenable, we have examined the merits of the disposition.

Reviewing the evidence presented, it is clear that a rational factfinder could have found that appellant (1) had a mental disorder, and (2) that condition caused him to have serious difficulty controlling his behavior or seriously affect his capacity to properly perceive and process reality or that condition affected both his capacities such that (3) he was a substantial danger of physical harm to others. Thus, the instructional error was harmless beyond a reasonable doubt.

DISPOSITION

The trial court's order is affirmed.

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Lambden, J.

We concur:

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Kline, P.J.

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Haerle, J.